

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions

of the United States Court of Customs and  
Patent Appeals and the United States  
Customs Court

Vol. 14

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JANUARY 9, 1980

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THE DEPARTMENT OF THE TREASURY  
U.S. Customs Service

## NOTICE

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# U.S. Customs Service

## *Treasury Decisions*

(T.D. 80-6)

### Cotton, Wool, and Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of cotton, wool, and manmade fiber textile products manufactured or produced in Macau

There are published below directives of November 14, 1979, received by the Commissioner of Customs from the acting chairman, Committee for the Implementation of Textile Agreements, concerning restriction on entry of cotton, wool, and manmade fiber textile products in various categories manufactured or produced in Macau. These directives amend, but do not cancel, that committee's directive of December 27, 1978 (T.D. 79-51).

These directives were published in the Federal Register on November 19, 1979 (44 F.R. 66232 and 44 F.R. 66233), by the committee.

(QUO-2-1)

Dated: December 20, 1979.

WILLIAM D. SLYNE  
(For G. Scott Shreve, Acting  
Director, Duty Assessment Division).

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U.S. DEPARTMENT OF COMMERCE,  
THE ASSISTANT SECRETARY FOR INDUSTRY AND TRADE,  
*Washington, D.C. November 14, 1979.*

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,  
*Department of the Treasury,*  
*Washington, D.C.*

DEAR MR. COMMISSIONER: On December 27, 1978, the chairman, Committee for the Implementation of Textile Agreements, directed

you to prohibit entry during the 12-month period beginning on January 1, 1979, and extending through December 31, 1979, of cotton, wool, and manmade fiber textile products, produced or manufactured in Macau, in excess of designated levels of restraint. The chairman further advised you that the levels of restraint are subject to adjustment.<sup>1</sup>

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of March 3, 1974, as amended, between the Governments of the United States and Portugal; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on November 19, 1979, and for the 12-month period beginning on January 1, 1979, and extending through December 31, 1979, entry into the United States for consumption and withdrawal from warehouse for consumption of wool textile products in category 445/446, produced or manufactured in Macau, in excess of 64,732 dozen.

Under the previously cited authorities, this directive also amends, but does not cancel, the directive of December 27, 1978, to prohibit, effective on November 19, 1979, and for the 12-month period which began on January 1, 1979, and extends through December 31, 1979, entry into the United States for consumption and withdrawal from warehouse for consumption of manmade fiber textile products in category 647/648, produced or manufactured in Macau, in excess of 201,564 dozen.

The levels of restraint established for category 445/446 and 647/648 have not been adjusted to reflect any imports after December 31, 1978. Imports during the period, January-August 1979, have amounted to 104,378 dozen in category 647/648.

Textile products in category 647/648 which have been exported to the United States prior to January 1, 1979, shall not be subject to this directive.

Textile products in category 647/648 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(1)(A) prior to the effective date of this directive shall not be denied entry under this directive.

(A detailed description of the textile categories in terms of TSUSA

<sup>1</sup> The terms "adjustment" refers to those provisions of the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of Mar. 3, 1975, as amended, between the Governments of the United States and Portugal which provide, in part, that: (1) Within the aggregate and group limits specific levels of restraint may be exceeded by designated percentages; (2) these levels may also be increased for carryover and carryforward up to 11 percent of the applicable category limits; and (3) administrative arrangements or adjustments may be made to resolve minor problems arising in the implementation of the agreement.



numbers was published in the Federal Register on January 4, 1978 (43 F.R. 884), as amended on January 25, 1978 (43 F.R. 3421), March 3, 1978 (43 F.R. 8828), June 22, 1978 (43 F.R. 26773), September 5, 1978 (43 F.R. 39408), January 2, 1979 (44 F.R. 94), March 22, 1979 (44 F.R. 17545), and April 12, 1979 (44 F.R. 21843).)

In carrying out the above directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

The actions taken with respect to the Government of Portugal and with respect to imports of manmade fiber textile products from Macau have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,  
*Acting Chairman, Committee for the  
Implementation of Textile Agreements.*

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U.S. DEPARTMENT OF COMMERCE,  
INDUSTRY AND TRADE ADMINISTRATION,  
*Washington, D.C., November 14, 1979.*

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,  
*Department of the Treasury,  
Washington, D.C.*

DEAR MR. COMMISSIONER: This directive amends, but does not cancel, the directive of December 27, 1978, from the chairman, Committee for the Implementation of Textile Agreements which directed you to prohibit entry during the 12-month period beginning on January 1, 1979, and extending through December 31, 1979, of cotton and manmade fiber textile products in certain specified categories, produced or manufactured in Macau, in excess of designated levels of restraint.

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to a further amendment to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of March 3, 1975, as amended, between the Governments of the United States and Portugal, you are directed to prohibit, effective on November 19, 1979,

and for the 12-month period beginning on January 1, 1979, and extending through December 31, 1979, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton and manmade fiber textile products in the following categories, produced or manufactured in Macau, in excess of the indicated levels of restraint:

<i>Category</i>	<i>Amended 12-month level of restraint <sup>1</sup></i>
340	99,666 dozen
341	62,069 dozen
641	62,069 dozen

<sup>1</sup> The levels of restraint have not been adjusted to reflect any imports after Dec. 31, 1978.

The actions taken with respect to the Government of Portugal and with respect to imports of cotton and manmade fiber textile products from Macau have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,  
*Acting Chairman, Committee for the  
Implementation of Textile Agreements.*

(T.D. 80-7)

#### Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of manmade fiber textile products manufactured or produced in the Philippines

There is published below a directive of November 15, 1979, received by the Commissioner of Customs from the acting chairman, Committee for the Implementation of Textile Agreements, concerning restriction on entry of manmade fiber textile products in category 641, manufactured or produced in the Philippines. This directive amends, but does not cancel, that committee's directive of December 27, 1978 (T.D. 79-42).

This directive was published in the Federal Register on November 20, 1979 (44 F.R. 66649), by the committee.

(QUO-2-1)

Dated: December 20, 1979.

WILLIAM D. SLYNE  
(For G. Scott Shreve, Acting  
Director, Duty Assessment Division).

U.S. DEPARTMENT OF COMMERCE,  
INDUSTRY AND TRADE ADMINISTRATION,  
*Washington, D.C., November 15, 1979.*

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,  
*Department of the Treasury,  
Washington, D.C.*

DEAR MR. COMMISSIONER: This directive further amends, but does not cancel, the directive issued to you on December 27, 1978, by the chairman, Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton; wool, and manmade fiber textile products, produced or manufactured in the Philippines.

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of August 22 and 24, 1977, as amended, between the Governments of the United States and the Republic of the Philippines; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on November 20, 1979, and for the 12-month period beginning on January 1, 1979, and extending through December 31, 1979, entry into the United States for consumption and withdrawal from warehouse for consumption of manmade fiber textile products in category 641, produced or manufactured in the Philippines, in excess of the following levels of restraint:

<i>Category</i>	<i>12-month level of restraint<sup>1</sup></i>
641 <sup>2</sup>	61,042 dozen

<sup>1</sup> The levels of restraint have not been adjusted to reflect any imports after Dec. 31, 1978. Imports during the period January-September 1979 have amounted to 37,478 dozen.

<sup>2</sup> In category 641, only TSUSA Nos. 382.0460 and 382.8139.

Manmade fiber textile products in the foregoing category which have been exported to the United States prior to January 1, 1979, shall not be subject to this directive.

Manmade fiber textile products in the foregoing category which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(1)(A) prior to the effective date of this directive shall not be denied entry under this directive.

A detailed description of the textile categories in terms of TSUSA

numbers was published in the Federal Register on January 4, 1978 (43 F.R. 884), as amended on January 25, 1978 (43 F.R. 3421), March 3, 1978 (43 F.R. 8828), June 22, 1978 (43 F.R. 26773), September 5, 1978 (43 F.R. 39408), January 2, 1979 (44 F.R. 94), March 22, 1979 (44 F.R. 17545), and April 12, 1979 (44 F.R. 21843).

In carrying out the above directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

The action taken with respect to the Government of the Republic of the Philippines and with respect to imports of manmade fiber textile products from the Philippines has been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,  
*Acting Chairman, Committee for the  
Implementation of Textile Agreements.*

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(T.D. 80-8)

#### Cotton and Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of cotton and manmade fiber textile products manufactured or produced in the People's Republic of China

There is published below a directive of October 29, 1979, received by the Commissioner of Customs from the acting chairman, Committee for the Implementation of Textile Agreements, concerning restriction on entry of cotton and manmade fiber textile products in categories 341 and 635, manufactured or produced in People's Republic of China.

This directive was published in the Federal Register on October 31, 1979 (44 F.R. 62555), by the committee.

(QUO-2-1)

Dated: December 20, 1979.

WILLIAM D. SLYNE  
(For G. Scott Shreve, Acting  
Director, Duty Assessment Division).

U.S. DEPARTMENT OF COMMERCE,  
INDUSTRY AND TRADE ADMINISTRATION,  
*Washington, D.C., October 29, 1979.*

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,  
*Department of the Treasury,*  
*Washington, D.C.*

DEAR MR. COMMISSIONER: Under the terms of section 204 of the Agricultural Act of 1956, and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on October 31, 1979, and for the 12-month period beginning on October 31, 1979, and extending through October 30, 1980, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton and manmade fiber textile products in categories 341 and 635, produced or manufactured in the People's Republic of China, in excess of the following levels of restraint:

<i>Category</i>	<i>12-month level of restraint</i>
341	266,196 dozen
635	110,551 dozen

Cotton and manmade fiber textile products in categories 341 and 635 that have been exported before October 31, 1979, shall not be subject to this directive.

Cotton and manmade fiber textile products in categories 341 and 635 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1)(A) prior to the effective date of this directive shall not be denied entry under this directive.

A detailed description of the categories in terms of TSUSA numbers was published in the Federal Register on January 4, 1978 (43 F.R. 884), as amended on January 25, 1978 (43 F.R. 3421), March 3, 1978 (43 F.R. 8828), June 22, 1978 (43 F.R. 26773), September 5, 1978 (43 F.R. 39408), January 2, 1979 (44 F.R. 94), March 22, 1979 (44 F.R. 17545), and April 12, 1979 (44 F.R. 21843).

In carrying out these directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

The actions taken with respect to the Government of the People's Republic of China and with respect to imports of cotton and manmade fiber textile products from China have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the

Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,  
*Acting Chairman, Committee for the  
Implementation of Textile Agreements.*

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(T.D. 80-9)

Cotton Textiles and Cotton Textile Products—Restriction on Entry

Restriction on entry of cotton textiles and cotton textile products manufactured or produced in Pakistan

There are published below directives of November 8 and November 14, 1979, received by the Commissioner of Customs from the acting chairman, Committee for the Implementation of Textile Agreements, concerning restriction on entry of cotton textiles and cotton textile products in categories 315 and 341, manufactured or produced in Pakistan. These directives amend but do not cancel, that committee's directive of December 27, 1978 (T.D. 79-45).

These directives were published in the Federal Register on November 15, and November 19, 1979 (44 F.R. 65811 and 44 F.R. 66234), respectively, by the committee.

(QUO-2-1)

Dated: December 20, 1979.

WILLIAM D. SLYNE  
(For G. Scott Shreve, Acting  
Director, Duty Assessment Division).

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U.S. DEPARTMENT OF COMMERCE,  
INDUSTRY AND TRADE ADMINISTRATION,  
*Washington, D.C., November 8, 1979.*

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,  
*Department of the Treasury,  
Washington, D.C.*

DEAR MR. COMMISSIONER: On December 27, 1978, the chairman, Committee for the Implementation of Textile Agreements, directed you to prohibit entry for consumption, or withdrawal from warehouse for consumption, during the 12-month period beginning on January 1,

1979, and extending through December 31, 1979, of cotton textile products in certain specified categories, produced or manufactured in Pakistan, in excess of designated levels or restraint. The chairman further advised you that the levels of restraint are subject to adjustment.<sup>1</sup>

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton Textile Agreement of January 4 and 9, 1978, as amended, between the Governments of the United States and Pakistan; and in accordance with the provisions of Executive order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed, effective on November 15, 1979, to increase the 12-month level of restraint established for cotton textile products in category 341 to 155,862 dozen.<sup>2</sup>

The action taken with respect to the Government of Pakistan and with respect to imports of cotton textile products from Pakistan has been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,  
*Acting Chairman, Committee for the  
Implementation of Textile Agreements.*

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U.S. DEPARTMENT OF COMMERCE,  
INDUSTRY AND TRADE ADMINISTRATION,  
Washington, D.C., November 14, 1979.

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,  
*Department of the Treasury,  
Washington, D.C.*

DEAR MR. COMMISSIONER: This directive further amends, but does not cancel, the directive issued to you on December 27, 1978,

<sup>1</sup> The term "adjustment" refers to those provisions of the Bilateral Cotton Textile Agreement of Jan. 4 and 9, 1978, between the Governments of the United States and Pakistan, which provides, in part, that: (1) Within the aggregate and applicable group limits of the agreement, specific levels of restraint may be exceeded by designated percentages; (2) these same levels may be increased for carryover and carryforward; and (3) administrative arrangements for adjustments may be made to resolve minor problems arising in the implementation of the agreement.

<sup>2</sup> The level of restraint has not been adjusted to reflect any imports after Dec. 31, 1978.

by the chairman Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton, wool, and manmade fiber textile products, produced or manufactured in Pakistan.

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton Textile Agreement of January 4 and 9, 1978, as amended, between the Governments of the United States and Pakistan; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on November 16, 1979, and for the 12-month period beginning on January 1, 1979, and extending through December 31, 1979, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textile products in category 315, produced or manufactured in Pakistan, in excess of the following level of restraint:

<i>Category</i>	<i>Adjusted 12-month level of restraint <sup>1</sup></i>
315	26,500,000 square yards

<sup>1</sup> The level of restraint has not been adjusted to reflect any imports after Dec. 31, 1978.

The actions taken with respect to the Government of Pakistan and with respect to imports of cotton, wool, and manmade fiber textile products from the Pakistan has been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,  
*Acting Chairman, Committee for the  
Implementation of Textile Agreements.*



# U.S. Customs Service

## *General Notice*

Availability of Reprinted Looseleaf Edition of Customs Regulations

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of availability.

SUMMARY: This document informs the public that an updated reprinted looseleaf edition of the Customs Regulations (19 CFR ch. I) is available from the Government Printing Office. In addition to the Customs Regulations, including all changes made through December 31, 1978 (T.D. 78-494), the reprint includes Treasury Department and Customs Service delegation orders, and an appendix containing the text of, or references to, sections of law and the text of regulations administered by other Government departments or agencies and enforced wholly or in part by Customs.

FOR FURTHER INFORMATION CONTACT: Shannon McCarthy, Regulations and Research Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-8237.

### SUPPLEMENTARY INFORMATION:

#### BACKGROUND

The regulations of the Customs Service, codified in title 19, chapter I, Code of Federal Regulations (19 CFR ch. I), have been issued by the Commissioner of Customs, with the approval of the Secretary of the Treasury, for the purpose of carrying out the Customs and navigation laws and other laws administered by Customs.

Title 19, Code of Federal Regulations, is published annually, revised as of April 1 of each year, by the Office of the Federal Register. In the interest of having the regulations as up to date as possible, Customs has the Government Printing Office print a looseleaf edition which is updated by the issuance of sets of revised pages three or four times each year. In addition to the regulations, the looseleaf edition also includes orders of the Secretary of the Treasury relating to the rights, privileges, powers, and duties of the Commissioner of Customs

and other Customs personnel, and Customs Delegation orders. An appendix to the looseleaf edition contains the text of, or references to, sections of law and the text of regulations administered by other Government departments or agencies and enforced wholly or in part by Customs.

Numerous sets of revised pages to the regulations have been issued since the last general reprint was prepared in 1976. As part of an ongoing program to improve the utility of the regulations, Customs has prepared a new reprint, including all changes through December 31, 1978 (T.D. 78-494). It is anticipated that there will be another reprinting during the first quarter of 1980, which will include all changes through December 31, 1979.

Orders for the new reprint are now being accepted by the Government Printing Office. Current subscribers will receive the reprint automatically. New subscribers may order the reprint by requesting the "Customs Regulations of the United States. [CRUS] (file code 1F)" from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The yearly subscription price of \$37 will entitle subscribers to receive the 1980 as well as the 1979 reprint.

A different printing process and format have been used for this reprint. While every effort has been made to insure correctness, users may notify the U.S. Customs Service, Regulations and Research Division, Washington, D.C. 20229, of any typographical or printing errors in order that corrections may be made. Suggestions for improvements also are requested.

Dated: December 26, 1979.

WILLIAM T. ARCHEY,  
*Acting Commissioner of Customs.*

[Published in Federal Register, Dec. 31, 1979 (44 F.R. 77294)]

# Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1239)

SCHOTT OPTICAL GLASS, INC. *v.* THE UNITED STATES, No. 79-18

## 1. CLASSIFICATION OF IMPORTS—OPTICAL GLASS.

Appeal from judgment of U.S. Customs Court in *Schott Optical Glass, Inc. v. United States*, 82 Cust. Ct.—, C.D. 4783 (1979), which affirmed denial by Customs Service of Schott's protest to classification of its imported merchandise as "optical glass." Affirmed.

## 2. *Id.*—COMMON MEANING.

When not otherwise defined in TSUS or indicated by legislative history, correct meaning of a term in a tariff provision is common meaning understood in trade and commerce.

## 3. *Id.*

What constitutes common meaning of tariff term is not question of fact but question of law, and in ascertaining that common meaning the court may consult dictionaries, scientific authorities, and other reliable sources of information.

## 4. *Id.*—INTENT OF CONGRESS.

Congress is presumed to attach common meaning to term in tariff provision, and legislative history may be dispositive of issue over common meaning.

## 5. *Id.*—PHYSICAL SHAPE OF GLASS.

Phrase "in any form" in 540.67 TSUS refers to physical shape of glass rather than to material or quality of construction.

## 6. *Id.*—COMMON MEANING OF OPTICAL GLASS.

Common meaning of "optical glass" embraces concept of "high quality" with respect to each of various optical properties—absorption, refraction, polarization, etc. A criterion for determining "high quality" with respect to one property may apply exclusively to that property (e.g., refractive index applies only to refractive property) or may also apply in determining "high quality" with

respect to other properties (e.g., homogeneity applies to both properties of absorption and refraction). When a glass is selected for a particular property, proper inquiry is whether the glass is of "high quality" with respect to that property, and quality with respect to other properties is immaterial.

U.S. Court of Customs and Patent Appeals, December 20, 1979

Appeal from U.S. Customs Court, C.D. No. 4783

[Affirmed.]

*Richard C. King*, Fitch, King and Caffentzis, attorney of record for appellant.  
*Alice Daniel*, Acting Assistant Attorney General, *David M. Cohen*, Director,  
 Commercial Litigation Branch, *Joseph I. Liebman*, Attorney in Charge, Field  
 Office, *Madeline B. Kuflik*, attorney of record for appellee.

[Oral argument on October 3, 1979, by *Richard C. King* for appellant and *Madeline B. Kuflik* for appellee.]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, and MILLER, *Associate Judges*,  
 and WATSON,\* *Judge*.

MILLER, *Judge*.

This is an [1] appeal from the judgment of the U.S. Customs Court in *Schott Optical Glass, Inc. v. United States*, 82 Cust. Ct. —, C.D. 4783 (1979), which affirmed the denial by the Customs Service of Schott's protest to classification of its imported merchandise as "optical glass." We affirm.

### Background

The imported merchandise consists of pieces of glass which are 6½ inches square and colored in shades of red, green, blue, yellow, and gray. It was classified under Tariff Schedules of the United States (TSUS) item 540.67<sup>1</sup> as "optical glass." Schott claimed classification as colored or special flat glass under item 542.92.<sup>2</sup>

\*The Honorable James L. Watson of the U.S. Customs Court, sitting by designation.

<sup>1</sup> The pertinent provisions are as follows:

Tariff Schedules of the United States ("TSUS"):

Schedule 5.—NONMETALLIC MINERALS AND PRODUCTS

Part 3.—Glass and Glass Products

A. Glass in the Mass; Glass in Balls, Tubes, Rods, and Certain Other Forms; Foam Glass; Optical Glass; and Glass Fibers and Products Thereof

Optical glass in any form, including blanks for spectacle lenses and for other optical elements; non-optical-glass blanks for corrective spectacle lenses; synthetic optical crystals in the form of ingots, segments of ingots, sheets, or blanks for optical elements; all the foregoing not optically worked; polarizing material, in plates or sheets, not cut to shape or mounted for use as polarizing optical elements:

540.67 Other optical glass and synthetic optical crystals; polarizing material... 40% ad val.

<sup>2</sup> The relevant provisions state:

Schedule 5.—NONMETALLIC MINERALS AND PRODUCTS

Part 3.—Glass and Glass Products

B. Flat Glass and Products Thereof

Colored or special glass: Weighing over 28 oz. per sq. ft.:

542.92 Not over 2¾ sq. ft. in area..... 0.7¢ per lb.  
 + 2.5% ad val.

From its examination of the legislative history of TSUS 540.67 and pertinent case law the Customs Court concluded that glass which is: (a) Very high quality, (b) used for optical instruments, and (c) capable of performing an optical function meets the definition of "optical glass" for tariff purposes, citing *Semon Bache & Co. v. United States*, 25 CCPA 239, T.D. 49339 (1937), *G.A.F. Corp., George S. Bush & Co. v. United States*, 67 Cust. Ct. 167, C. D. 4269 (1971), and *Ednal Vo. v. United States*, 6 Cust. Ct. 552, Abs. 45423 (1941). The Customs Court declared that, based on the presumption of correctness that attaches to the classifying officer's decision, the foregoing indicia were presumed to be applicable to the involved merchandise; further, that the evidence supported the presumption. It noted that appellant was not in disagreement with these indicia, but, rather, had argued that an additional factor must be present, namely: The glass must have a refractive index and dispersion which are known and controlled to very close tolerances (a degree of four to six decimal places). On this issue, the Customs Court held that appellant failed to sustain its burden of proof by a preponderance of the credible evidence.

### Opinion

It is well settled in Customs law that, [2] when not otherwise defined in the TSUS or indicated by legislative history, the correct meaning of a term in a tariff provision is the common meaning understood in trade and commerce. *United States v. Rembrandt Electronics, Inc.*, 64 CCPA 1, 542 F. 2d 1154 (1976), *Barnebey-Cheney Co. v. United States*, 61 CCPA 10, 487 F. 2d 553 (1973); and *Trans-Atlantic Co. v. United States*, 60 CCPA 100, 471 F. 2d 1397 (1973). It is also well settled that [3] what constitutes the common meaning of a tariff term is not a question of fact but a question of law. In ascertaining the common meaning of a tariff term, the court may consult dictionaries, scientific authorities, and other reliable sources of information. *Trans-Atlantic Co. v. United States*, *supra*; *Nomura (America) Corp. v. United States*, 62 Cust. Ct. 524, 299 F. Supp. 535 (1969), *aff'd*, 58 CCPA 82, 453 F. 2d 1319 (1971). [4] Congress is presumed to attach the common meaning to a term in a tariff provision, and the legislative history may be dispositive of an issue over common meaning. *Certified Blood Donor Services, Inc. v. United States*, 62 CCPA 66, 70, C.A.D. 1147 (1975).

TSUS General Rule of Interpretation 10(c) provides that:

(c) An imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:

(i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;

(ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., between the primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading \* \* \*.

Applying this rule, it is clear that the meaning of "other optical glass" in 540.67 cannot be broader than "[o]ptical glass in any form" in its superior heading. It is also clear that [5] the phrase "in any form" refers to the physical shape of the glass rather than to a material or quality of construction. *United States v. Central Scientific Co.*, 21 CCPA 214, T.D. 46749 (1933).

In considering the common meaning of "optical glass," we note that the "*Tariff Classification Study*," schedule 5, part 3, 128 (1960), states that 540.67 "covers: (1) Prisms and optical elements other than lenses, of glass, not optically worked, now dutiable \* \* \* as scientific articles of glass; (2) optical glass other than in the form of lenses or prisms; (3) synthetic optical crystals other than in the form of ingots; and (4) polarizing material of any substance in sheets or plates." Regarding the latter it stated:

The existing tariff has no specific provision for polarizing material in sheet or plate form. \* \* \* The sheets or plates are cut to shape to make polarizing elements for microscopes and other optical instruments, for sunglasses, and for spectacles for viewing three-dimensional movies, and for other uses. \* \* \* It is possible that they would be classifiable in glass provisions or by similitude to glass articles. They are therefore being assimilated in the schedule at this point, at the rate applicable to optical glass.

The description of "optical glass" in the "Summaries of Trade and Tariff Information," schedule 5, volume 4, 33 (1968), "covers *not-optically-worked*<sup>3</sup> articles such as optical glass in any form \* \* \*" (italic added and footnote omitted). The "Summaries" also state: "Optical glass is clear, high-quality glass that meets precision specifications as to its chemical composition, homogeneity, and freedom from physical defects." It is silent on refraction and dispersion properties.

The "Encyclopedia Britannica," volume 10 (1955), 419B, cited by the Customs Court, states:

Optical glass differs from other types of glass in two essential characteristics. The first of these is its freedom from imperfections, of which the most common are unmelted particles, commonly called stones; bubbles; and chemical inhomogeneity, which

<sup>3</sup> The "Summaries" define "not-optically-worked" to mean the glass has not been subjected to any grinding or polishing incident to surface shaping for producing optical properties.

produces regions or streaks of differing refractive index called striae. The elimination of striae is the most difficult problem in the manufacture of optical glass. The glass must also be physically homogeneous and free from mechanical strain, which is effected by an annealing treatment under conditions determined by the composition of the glass.

The second fundamental characteristic of optical glass is that it can be obtained in a wide range of optical properties. For the manufacture of corrected lens systems, glasses must be available having not only a wide range of refractive index ( $n_D$ ) but also of dispersion; and for many special cases there is required knowledge not only of the mean dispersion ( $n_F - n_C$ ) but also of the partial dispersion ( $n_D - n_C$ ,  $n_F - n_D$ , and  $n_C - n_C$ ). These properties, and a quantity commonly given in optical glass catalogs is the  $V$  value [the combined formula for the  $V$  value is printed here]. Glasses are available having refractive index from 1.48 (fluor crowns) to 1.8 (extra dense flints) or even higher.

The testimony of appellant's witness, Dr. Norbert J. Kreidl (professor of ceramic engineering at the University of Missouri and author of more than 100 papers in the field of glass science) explains what is meant by "a wide range of optical properties"—the phrase used in the "Encyclopedia Britannica" statement. According to him, optical property "means the way light behaves when it passes through a material," and optical properties include absorption, refraction, transmission, reflection, dispersion, polarization, fluorescence, emission, electromagnetic effects, electro-optical effects, and magnetic optical effects; in short, any effect visible in the material when light strikes it.

In view of the foregoing, we are persuaded that [6] the common meaning of "optical glass" embraces the concept of "high quality" with respect to each of the various properties described above, absorption, refraction, polarization, etc. A criterion for determining "high quality" with respect to one property may apply exclusively to that property (e.g., refractive index applies only to the refractive property) or may also apply in determining "high quality" with respect to other properties (e.g., homogeneity applies to both the properties of absorption and refraction). When a glass is selected for a particular property, the proper inquiry is whether the glass is of "high quality" with respect to that property, and the quality with respect to other properties is immaterial.

In the case of glass in which the refraction property is critical, at least two criteria must be met. As described by Dr. Kreidl:

[O]ne is a very careful knowledge of the chemical composition, that means both the deliberate addition of the necessary chemicals and the guaranty in the processing that this intended composition is actually obtained. The second is the refractive index to the degrees specified in a good optical glass is strongly affected by

the way it is cooled down or annealed. The lack of knowledge or lack of patience in the time allowed for it could lead to serious deviations of the [refractive] index and even in the fourth [decimal] place.

In the case of glass in which the absorption property is critical, Dr. Kreidl stated that the degree of uniformity of color in the glass (homogeneity) must be "very great," although he added that "you do not require that this homogeneity is to the numbers stated in an optical glass." Nevertheless, the unrebutted testimony of the Government's witnesses<sup>4</sup> clearly establishes that the involved Schott glass is of very high or of the highest quality available in glass chosen for its absorption property.

The Customs Court found that the Government had submitted "competent, reliable, and credible affirmative evidence" to support the presumption that the involved merchandise is within the common meaning of the provision for optical glass.

Appellant argues that "optical glass" must have a refractive index and dispersion controlled to very close tolerances (four to six decimal places for refractive index) and that such a controlled refractive index results from a more careful selection and control of materials and from an annealing process of much greater length and sophistication than for other glass. However, this argument applies to glass in which the refraction property is critical; whereas the absorption property is critical in the glass with which this case is concerned.

Accordingly, we hold that the involved Schott glass is "optical glass" for purposes of TSUS item 540.67.

The judgment of the Customs Court is *affirmed*.

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*Richard L. Stevenson v. International Trade Commission, New Zealand Enterprises Co., Prophet International Co., Lido Trading Co., Ltd., Hardy Enterprise Corp., No. 79-12*

1. SECTION 337, TARIFF ACT OF 1930, AS AMENDED.

Action of U.S. International Trade Commission, terminating its investigation of the importation of certain skateboards in view of its determination of no violation of Tariff Act Section 337 based on its holding of invalidity of patent allegedly infringed by the imported skateboards, reversed and remanded.

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<sup>4</sup>Dr. Radu Mavrodineanu of the special analytical instrumentation section at the National Bureau of Standards, author of some 70 papers in applied optics; Richard N. Mstrom, holder of a master of science degree in optical engineering from the Institute of Optics, University of Rochester, and employed by Honeywell, Inc., in the area of optical systems and optical instrument design; and Robert C. Saxton, holder of a bachelor of science degree in chemical engineering from Tri-State College, and employed for 28-years at the Product Engineering Division of Corning Glass Works, the last 9 years in the optical products department working entirely with color filter glass.



2. OBVIOUSNESS, 35 U.S.C. 103.

Determination of obviousness under 35 U.S.C. 103 is a legal conclusion based on factual evidence; upon review CCPA will make an independent determination as to the legal conclusions and inferences which should be drawn from the findings of fact.

3. ID.—PRIOR ART.

Whether certain art is to be considered prior art requires consideration of similarities and differences in structure and function of the inventions disclosed in the references.

4. PRESUMPTION OF VALIDITY, 35 U.S.C. 282.

Proof of the existence of anticipating devices must be clear and convincing to overcome the presumption of validity in 35 U.S.C. 282.

5. ID.

In determination of obviousness, 35 U.S.C. 282 requires a presumption of validity, with the burden of persuasion remaining on party asserting invalidity.

6. ID.—COMMERCIAL SUCCESS.

Secondary considerations such as commercial success must also be evaluated in determining the final validity of a determination of obviousness.

7. EVIDENCE OF RECORD.

Evidence of record to rebut prima facie nexus between commercial success and the merit of the invention, opinion testimony of a witness with a demonstrated financial interest in the outcome, is insufficient to overcome evidentiary value of evidence establishing nexus.

8. ID.

There is no evidence of record to suggest that at the time of appellant's invention, the upswept tail of the rocker skateboard would function to provide improved maneuverability.

9. CLAIMS.

A broad claim is not construed to contain limitations expressed in the more narrow claims.

10. TERM COUPLED."

The term "coupled" is sufficiently broad to read on a one-piece molded skateboard construction.

11. FRAUD—INEQUITABLE CONDUCT.

Absent any evidence of bad faith on the part of appellant, CCPA is precluded from any finding of fraud or inequitable conduct.

12. ID.

Bare assertions by appellees, unsupported by any evidence, cannot provide clear and convincing evidence required to establish fraud or inequitable conduct.

U.S. Court of Customs and Patent Appeals, December 20, 1979

Appeal from International Trade Commission, Investigation No. 337-TA-37

[Reversed and remanded.]

*Keith D. Beecher*, Attorney of record for appellant.

*Russell N. Shewmaker*, General Counsel, *Jeffrey M. Lang*, Deputy General Counsel, *N. Tim Yaworski*, attorneys of record for appellee, International Trade Commission, *Myron Solter* and *David Simon*, attorneys of record for appellees New Zeal Enterprises Co., et al.

[Oral argument on October 3, 1979, by Keith D. Beecher, for appellant and by N. Tim Yaworski for International Trade Commission and David Simon for New Zeal Enterprises Co., et al.]

Before MARKEY, Chief Judge, RICH, BALDWIN and MILLER, Associate Judges, and WATSON, Judge.\*

BALDWIN, Judge.

[1] This is an appeal from the November 13, 1978 order of the U.S. International Trade Commission (Commission) which terminated investigation No. 337-TA-37, "In the Matter of Certain Skateboards and Platforms Therefor," in view of its determination that no violation of section 337 of the Tariff Act of 1930, as amended by the Trade Act of 1974, 19 U.S.C. 1337,<sup>1</sup> exists in the importation into, or sale in, the United States of certain skateboards and platforms therefor. We reverse and remand.

### *Background*

On November 4, 1977, appellant, Richard L. Stevenson (Stevenson) filed an amended complaint with the Commission pursuant to sec-

\* The Honorable J. L. Watson, U.S. Customs Court, sitting by designation.

<sup>1</sup> 19 U.S.C. 1337 provides, in pertinent part:

§ 1337. *Unfair practices in import trade—Unfair methods of competition declared unlawful*

(a) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

#### *Determinations; review*

(c) The Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section. Each determination under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5. All legal and equitable defenses may be presented in all cases. Any person adversely affected by a final determination of the Commission under subsection (d) or (e) of this section may appeal such determination to the U.S. Court of Customs and Patent Appeals. Such court shall have jurisdiction to review such determination in the same manner and subject to the same limitations and conditions as in the case of appeals from decisions of the U.S. Customs Court.

#### *Exclusion of articles from entry*

(d) If the Commission determines, as a result of an investigation under this section, that there is violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

tion 337, alleging that unfair methods of competition exist in the importation and distribution of certain skateboards alleged to infringe claims 1, 2, 7, and 8 of U.S. patent No. 3,565,454 to Stevenson. The filing date of the Stevenson patent is June 12, 1969. Claim 1 is the broadest claim, and reads:

1. A sport maneuvering device comprising:
  - a. an elongated platform for supporting a person, the platform having a forward end section and a rearward end section;
  - b. wheels coupled to and beneath the platform; and
  - c. an inclined foot-depressible lever coupled to the rearward end section of the platform, the lever being oriented so its plane slopes upwardly and rearwardly from the platform wherein a person positioned with one foot on the platform and the other foot resting on the lever may tilt the platform to a desired position by depressing the lever.

The subject device of the claims at issue is commonly known as a kicktail skateboard.

Foreign manufacturers and exporters named and served in the investigation were New Zeal Enterprises Co., Ltd., Lido Trading Co., Ltd., Prophet International Co., Ltd., Hardy Enterprise Corp., and Amapala Marine (name corrected to S. K. B. de Hondiuras [sic] by order issued March 31, 1978). Importers named and served were Sportmaster, Inc., Marco Polo Co., National Sporting Goods Corp., Dixie Trading Co., and Woodline Products Co. The only named respondents to appear at the hearing (referred to collectively as the "Taiwan manufacturers") were New Zeal Enterprises, Co., Ltd., Prophet International Ltd., Lido Trading Co., Ltd., and Hardy Enterprise Corp. It was stipulated by the active parties that all named respondents were engaged in either export to or importation into the United States of the articles in question.<sup>2</sup>

An evidentiary hearing was conducted by a Commission Administrative Law Judge (ALJ). His recommendation was that the Commission determine that there is no violation of section 337 in the importation and sale in the United States of skateboards and platforms therefore meeting claims 1, 2, 7, and 8 of the Stevenson patent. This recommendation resulted from his conclusion that the subject claims are invalid as obvious under 35 U.S.C. 103 in view of prior art.

<sup>2</sup> The Commission's brief reports that the following stipulations were entered into by the active parties below:

- (1) There is importation of the skateboards in question into the United States;
- (2) There is an industry devoted to production of the skateboards in question in the United States;
- (3) The U.S. industry is composed of appellant and his licensees;
- (4) The U.S. industry is efficiently and economically operated;
- (5) Importation of the skateboards in question has the effect or tendency to destroy or substantially injure the U.S. industry; and
- (6) If infringement is found as to one of the accused imported skateboards (staff exhibit No. 5 (SX-5)), then all the accused imported skateboards infringe the Stevenson patent.

The Commission, with Chairman Parker dissenting and Commissioner Stern not participating, ordered the investigation terminated on the basis of a determination that no violation of section 337 exists. As reflected in the joint opinion of Commissioners Moore and Bedell and the concurring opinion of Commissioner Alberger, the basis of this determination was the finding that claims 1, 2, 7, and 8 of the patent to Stevenson are invalid for purposes of section 337 as obvious in view of prior art pursuant to 35 U.S.C. 103.<sup>3</sup>

### *Issue*

We face the dispositive issue whether the subject matter of claims 1, 2, 7, and 8 of the patent to Stevenson would have been obvious to one of ordinary skill in the art of designing skateboards at the time the invention was made.

### OPINION

#### *Standard of Review*

The Commission's brief argues that the standard of review in this case is whether the determination of the Commission is clearly contrary to the weight of the evidence before it. We do not agree.

This determination was based on the Commission's finding that the subject claims of the Stevenson patent were invalid as obvious in view of prior art under 35 U.S.C. 103 [2]. However, "obviousness is a legal conclusion based on factual evidence, *Graham v. John Deere Co.*, [383 U.S. 1, 148 USPQ 459 (1966)] \* \* \* and not a factual determination." *In re Warner*, 54 CCPA 1628, 1634 n.6, 379 F. 2d 1011, 1016 n.6, 154 USPQ 173, 177 n.6 (1967). Therefore the proper issue before us is whether the Commission erred, as a matter of law, in holding that the claims were invalid under 35 U.S.C. 103. In deciding this issue, the court will make "an independent determination as to the legal conclusions and inferences which should be drawn from [the findings of fact]." See *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961).

#### *Prior Art*

Under section 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent

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Commissioners Moore and Bedell, in their joint opinion, reasoned that:

The functional advantages of the kicktail skateboard relative to the rocker skateboard arise from the fact that the front portion of the former is flat whereas that of the latter is curved. The continuously curved shape of the rocker board causes a dip in the center portion of the board that deepens as the curvature of the board increases. This dip can cause balance problems for the rider attempting to perform "wheelies," as well as increasing the likelihood that the center portion of the board will scrape against the ground. The presiding officer [ALJ] found that it would have been obvious to a person of ordinary skill at the time the kicktail invention was made to eliminate the rocker board's balance and grounding problems by simply flattening its center and forward portions. We agree.

art resolved. Against this background the obviousness or nonobviousness of the subject matter is determined. *Graham v. John Deere Co.*, supra at 17.

(1) *The Abbott water ski and Kelly surfboard.*—The Taiwan manufacturers argue that the Abbott water ski patent, U.S. patent No. 3,056,148, and the Kelly hydroplane surfboard patent, U.S. patent No. 3,111,695, are relevant prior art. The patents disclose, respectively, a water ski and a surfboard with an upturned aft plane.

[3] In a simple mechanical invention a broad spectrum of prior art must be explored and it is reasonable to permit inquiry into other areas where one of ordinary skill in the art would be aware that similar problems exist. *In re Heldt*, 58 CCPA 701, 433 F. 2d 808, 167 USPQ 676 (1970). Whether certain art is to be considered as prior art, we must consider the similarities and differences in structure and function of the inventions disclosed in the references. *In re Ellis*, 476 F. 2d 1370, 177 USPQ 526 (CCPA 1973). There is similarity in structure, with the water ski, the surfboard, and the kicktail deck all having an upturned aft plane. However, the problem of maneuvering a wheeled vehicle across a hard surface would appear to differ significantly from the problem of maneuvering a surfboard or water ski through water, a fluid medium. Therefore, we agree with the majority of the Commission that one of ordinary skill in the art of designing skateboards would not have turned to these patents for guidance on a problem of maneuverability of a wheeled vehicle.

(2) *The woodblock and heelplate skateboards.*—The Taiwan manufacturers also strongly argue anticipation of the subject claims by the Langton primitive woodblock skateboard and the Gottlieb heelplate skateboard. One witness, Mr. Langton, testified that he knew of a primitive woodblock skateboard prior to appellant's invention. This was a plank of wood with roller skates attached underneath, and a 2-by-4 shaved off at an angle attached across the rear of the plank. No physical exhibit was offered. Mr. Langton is president of a company which manufactures kicktail skateboards. Another witness, Mr. Gottlieb, testified that he produced a "heelplate" skateboard prior to Stevenson's invention. This was a flat skateboard with a shoe heel attached to the upper surface of the board aft of the rear wheels. No physical exhibit was presented. Mr. Gottlieb also manufactures kicktail skateboards and at the time of his testimony was defending a patent infringement suit brought against Sears & Roebuck Co. by appellant on the same patent now under consideration. Neither witness could recall the position of the rear wheels relative to the aft end.

The evidence presented is insufficient to establish the existence of any anticipating devices. [4] Proof of such devices, alleged to be

complete anticipations of the subject patent, must be clear and convincing to overcome the presumption of validity.<sup>4</sup> Uncorroborated oral testimony of prior inventors or users with a demonstrated financial interest in the outcome of the litigation is insufficient to provide such proof. *The Barbed Wire Patent*, 143 U.S. 275, 284 (1892); *Jones Knitting Corp. v. Morgan*, 361 F. 2d 451, 149 USPQ 659 (3d Cir. 1966).

(3) *The rocker skateboard.*—A physical exhibit, RX-13, of a rocker skateboard has been admitted into the record. A rocker board differs from a flat skateboard in that the platform of the rocker board has an arcuate, continuously curved configuration with the leading and trailing edges each higher than the center portion of the platform. A rocker board is sometimes referred to as a spoon board or a Hobie board, after its designer, Hobie Alter. Considering the testimony of the witnesses as well as the admissions of Stevenson, who had manufactured rocker boards prior to his invention now under consideration, it is clearly established that rocker boards, exemplified by physical exhibit RX-13, are relevant prior art.

(4) *The flat skateboard.*—The flat skateboard, which has a flat platform, was acknowledged in the Stevenson patent specification as prior art.

Thus, on the record before us, the prior art includes, in addition to those patent references cited by the examiner in the examination of the Stevenson application, both flat skateboards and rocker skateboards.

The differences between the prior art represented by flat boards and rocker boards and the claims at issue are confined solely to the configuration of the platforms. The platform of the flat skateboard is flat. The platform of the rocker board is arcuate shaped, forming a continuous curve with the leading and trailing ends each higher than the central portion of the platform. The platform of the claimed board has a section that is flat, with an inclined foot-depressible lever coupled to the rearward end section, the lever being oriented so its plane slopes upwardly and rearwardly from the platform.<sup>5</sup>

<sup>4</sup> 35 U.S.C. 282, in effect at the time appellant filed his complaint, provides in part:

A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of other claims; dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting it.

<sup>5</sup> While claim 1 does not specifically limit the elongated platform to a flat shape, a review of the entire specification including the figures, and particularly claim 2 which refers to "an intersection angle defined by the planes of the platform and lever," we conclude that the elongated platform recited in claim 1 is planar. Note that we do not read the limitation of claim 2 into claim 1, but instead use the recitation in claim 2 which is a part of the entire specification as filed, as evidence to determine the definition of elongated platform in claim 1.

Claim 2 reads:

2. The structure according to claim 1, wherein an intersection angle defined by the planes of the platform and lever is between 20 degrees and 50 degrees.

*Obviousness*

[5] In determining the presence or absence of obviousness, and in considering the facts of record before it, a court must remain aware that a patent shall be presumed valid and that the burden of persuasion is and always remains upon the party asserting invalidity, as required by 35 U.S.C. 282. See n. 4 *supra*. *Solder Removal Co. v. International Trade Commission*, 65 CCPA 120, 582 F. 2d 628, 199 USPO 129 (1978), and cases cited therein. The arguments before us and the Commission below focus on the prior art comprising the rocker board and the flat board.

The rocker board has been introduced into the record as a physical exhibit rather than in the form of a written description in a patent or otherwise. The physical exhibit of the rocker provides us with an example of an upswept trailing end, or tail, which is inclined at an angle to a horizontal surface. We must consider the evidence of record to determine what, if any, teachings were provided to one of ordinary skill in the art at the time of Stevenson's invention that would have made it obvious to substitute the flat platform of the flat skateboard for the arcuate platform of the rocker, or conversely to combine the upswept, inclined tail of the rocker with the flat skateboard.

(1) *Testimony of witnesses.*—The physical exhibit, RX-13, of a rocker skateboard was introduced by Mr. Gottlieb, a manufacturer of skateboards, who testified that the rocker board existed prior to Stevenson's invention of the kicktail skateboard. Mr. Gottlieb provided no testimony with regard to the actual teachings inherent in the rocker board at the time of appellant's invention.

Appellee's witness Mr. Langton, the president of the National Skateboard Association, Inc., testified to his early experience with primitive wood plank skateboards in the 1950's. He indicated that he did not perform many maneuvers on such boards and could recall only "straight-ahead type of riding on an inclined hill or street." Mr. Langton did not become actively involved in skateboarding until 1976, so his testimony provides us with no understanding of the teachings of the rocker board concerning maneuverability at the time of appellant's invention.

Mr. Langton, an admittedly poor skateboard rider, found no difference in maneuverability between a rocker and a flat board. It was his opinion that the kicktail has achieved its commercial success for cosmetic reasons. The National Skateboard Association, Inc., has a manufacturing division that makes and sells skateboards of which 95 percent are kicktail skateboards.

Appellee's last witness was Mr. Criswell, who first began skateboarding in 1966 with a rocker board. He stopped for 19 months while in the military service, then began again at the end of 1969. However,



Mr. Criswell provided no testimony with regard to any advantages of maneuverability to be gained from the upswept tail of the rocker board during this period prior to appellant's invention. From his testimony, Mr. Criswell appears to be a very accomplished skateboarder who has participated competitively since 1975. He testified that a rocker board would have certain advantages over a flat board or a kicktail in bowl riding, which involves thrusting your weight up the side of a bank or bowl, turning at the top, then shooting down the bowl. However, he was in one bowl riding contest and used a kicktail skateboard. He has participated in free-style contests using a kicktail. Freestyle contests require each skateboarder to put together a performance routine requiring continuity of many tricks or maneuvers. He rides the same kicktail in downhill slalom races. He uses a kicktail "mostly just to know where [his] foot is, knowing where the back is. It's a feel." When he was asked why kicktails have captured so large a segment of the market, he suggested that it was "probably because everybody in California rides them," though he was not sure why. We observe that Mr. Criswell, who by his testimony has been clearly established to be a highly proficient skateboarder, contracts for the manufacture of and distributes skateboards, 100 percent of which are kicktails, and uses a kicktail board himself in his exhibitions and competitive events.

Appellant's witness, Mr. Radkey, is a research scientist for a firm engaged by appellant to conduct an analysis of mechanical advantages of the geometry of the kicktail deck over the flat and rocker decks. His conclusions drawn from this analysis generally support specific advantages for the kicktail deck. In cross examination, Mr. Radkey did surmise that a rocker board and a kicktail board of a given identical angle would perform identically in regard to certain elements of his static analysis of the board geometries. Mr. Radkey, however, did no physical testing of the skateboards and has never ridden a skateboard.

Appellant's witness, Mr. Graham, is president of the Pro-Am Skateboard Racing Association, and has worked actively organizing various skateboard competitions. He testified that the kicktail provides definite advantages in performing free-style maneuvers. At appellant's request, Mr. Graham conducted a survey of the 500 members of his association, with 45 percent responding to the survey requests. The survey comprised 19 questions. A substantial number of members had ridden the flat, the rocker, and the kicktail. The results of the survey indicated a decided preference for the kicktail.

This leaves the testimony of appellant, Mr. Stevenson, to consider. Appellant acknowledged the existence of the rocker prior to his invention. He testified that the purpose of the rocker design was to



simulate visually the look of a surfboard, with a visual function as opposed to the mechanical function of the kicktail.

Mr. Stevenson submitted a collection of five affidavits. The five affiants are all experienced skateboarders with competitive experience, some professional. The affiants all have ridden flats, rockers, and kicktails and all find the kicktail to be superior to the others. The affiants all agree that far greater maneuverability is possible with the kicktail. They all cite particular problems of imbalance associated with the rocker board.

(2) *Commercial success.*—The brief for the Taiwan manufacturers improperly asserts that commercial success can only tip the scales in favor of patentability in close cases. The cases cited by the Taiwan manufacturers, *Digitronics Corp. v. New York Racing Association, Inc.*, 553 F. 2d 740, 193 USPQ 577 (2d Cir. 1977), *International Telephone and Telegraph Corp. v. Raychem Corp.*, 538 F. 2d 453, 191 USPQ 1 (1st Cir. 1976), and cases cited therein, support their view that "[o]nly in a close case, in which application of the subjective criteria of nonobviousness in 35 U.S.C. 103 does not produce a firm conclusion, can these objective or secondary considerations be used to 'tip the scales in favor of patentability.'" *Digitronics*, supra at 748, 193 USPQ at 584. Contrary to the statement in *Digitronics*, we find nothing in *Sakraid v. Ag Pro, Inc.*, 425 U.S. 273, 189 USPQ 449 (1976) that "laid to rest" the view followed by this court and enunciated in *Graham v. John Deere Co.*, supra at 17, 36, 148 USPQ at 467, 474. [6] The inference of obviousness drawn from prior art disclosures is only prima facie justification for drawing the ultimate legal conclusion that the claimed invention is obvious under 35 U.S.C. 103. Therefore, it is necessary that such secondary considerations also be evaluated in determining the final validity of that legal conclusion. As presented *John Deere*, such secondary considerations may serve to "guard against slipping into hindsight" and "to resist the temptation to read into the prior art the teachings of the invention in issue."

The ALJ found as fact, and it has been undisputed by either party, that presently kicktail skateboards constitute approximately 90 to 95 percent of production and sales in the skateboard industry. It is also clear from the record that the only difference between appellant's kicktail skateboard and the prior art flat skateboard is the provision by appellant of "an inclined foot-depressible lever coupled to the rearward end section of the platform." Appellant has submitted five affidavits of experienced competitive skateboarders to attest to the fact that the kicktail is superior and provides far greater maneuverability than the flat or rocker boards. The survey of the members of the Pro-Am Skateboard Racing Association supports these affidavits

by showing a decided preference for the kicktail because of its functional attributes. We also note that the majority opinion of Commissioners Moore and Bedell, as well as the ALJ, found the kicktail to possess functional advantages over the rocker. See n.3 *supra*. These factors establish *prima facie* a nexus between commercial success and the merit of appellant's invention, the provision of an inclined foot-depressible lever. *In re Felton*, 484 F. 2d 495, 179 USPQ 295 (CCPA 1973); *In re Caveney*, 55 CCPA 721, 386 F. 2d 917, 155 USPQ 681 (1967).

In rebuttal, to show that the commercial success is unrelated to the merits of the invention, appellees have presented one witness, Mr. Langton, who gave his opinion that the commercial success was due to cosmetic reasons. Appellees presented one other witness, Mr. Criswell, who was not sure why kicktails have captured so large a segment of the market. Mr. Criswell is a highly proficient skateboarder who uses the kicktail because it helps him to know where his foot is. We earlier noted that Mr. Criswell, like Mr. Langton, has a personal financial interest in kicktail skateboards.

[7] Thus, appellees have chosen to rebut appellant's *prima facie* nexus between commercial success and the merit of his invention with the opinion testimony of a single witness with a demonstrated financial interest in the outcome. As noted earlier, we must subject such testimony to close scrutiny. *The Barbed Wire Patent*, *supra*; *Jones Knitting Corp. v. Morgan*, *supra*.

We consider the testimony proffered by appellee to be insufficient to overcome the evidentiary value of that of appellants. The net result is a positive inference that the claimed skateboard would have been unobvious at the time the invention was made to one of ordinary skill in the art.

[8] After reviewing the evidence which has been summarized above, we find there is no evidence of record that would have suggested to one having ordinary skill in the art at the time of appellant's invention that the upswept tail of the rocker board would function to provide improved maneuverability. In fact, there is substantial evidence to the contrary that problems of imbalance result from the curved deck of the rocker. There is nothing in the testimony of appellee's witnesses to suggest that one having ordinary skill in the art would have found it obvious to modify either the flat or the rocker boards in such a manner as to result in the claimed kicktail skateboard. The evidence tends to support a finding that definite advantages in maneuverability adhere to the claimed skateboard configuration. To read into the upswept tail of the rocker board the teachings of appellant's kicktail is precisely the hindsight reasoning cautioned against in *Graham v. John Deere*, *supra*. Simplicity and hindsight are not proper

criteria for resolving the issue of obviousness. *In re Van Wanderham*, 54 CCPA 1487, 378 F. 2d 981, 154 USPQ 20 (1967).

### *Infringement*

Claim 1 requires "an inclined foot-depressible lever coupled to the rearward end section of the platform." There are narrower claims in the patent than those we have considered in this action which restrict the construction of the lever to the tubular construction shown in the drawings and appellant's preferred embodiment. It is not necessary to describe in the specification all possible forms in which the claimed limitation may be reduced to practice. [9] Thus, we do not construe a broad claim to contain limitations expressed in the more narrow claims. *Smith v. Snow*, 294 U.S. 1, 24 USPQ 26 (1935). [10] In the instant case it is the provision by appellant of an inclined foot-depressible lever rather than the specific manner in which it is coupled to the skateboard platform which more accurately reflects appellant's invention. Therefore, we agree with the Commission that the term "coupled" is sufficiently broad to read on the one-piece molded skateboard platform of SX-5. See n. 2, stipulation 6 supra. We therefore need not consider application of the doctrine of equivalents.

### *Unenforceability*

The Taiwan manufacturers assert that the Stevenson patent is unenforceable because during its prosecution before the Patent and Trademark Office (PTO), the patentee failed to disclose relevant prior art, i.e., the rocker board, to the examiner. Further, it is asserted that the patentee affirmatively misrepresented to the examiner the state of the art of skateboard construction in regard to (a) claiming adjustable wheels and (b) disclosing the means of attaching wheel assemblies to the skateboard platform. Therefore, they argue, the patent is unenforceable because it was obtained through inequitable conduct.

We turn to our opinion in *Norton v. Curtiss*, 57 CCPA 1384, 433 F. 2d 779, 167 USPQ 532 (1970), for guidance in evaluating these charges of misconduct.

The Stevenson patent was allowed on the first action by the PTO. Consequently, the file history provides no representations made by Stevenson to the PTO other than those representations contained in the original application. Stevenson did disclose the conventional flat skateboard in his specification. He did not disclose the rocker board to the PTO.

[11] Stevenson has testified that he knew of the rocker board, that they were very commonplace, and that he himself had built one for years. He did not disclose the rocker board to the PTO because "[t]hey did not work. It was so dramatically different that \* \* \* [he] just

could not conceive \* \* \* why there would be any need to try to draw any parallel or any connection there. They are different, they don't work the same; their effective use is different, the market." The evidence of record discussed above, including the consideration of commercial success, support these distinctions made by Mr. Stevenson. He clearly considered the conventional flat skateboard to be the most relevant prior art. Absent any evidence of bad faith on the part of Mr. Stevenson, we are precluded from any finding of fraud or inequitable conduct on his part by his failure to disclose the rocker board to the PTO. Id. at 1406, 433 F. 2d at 795, 167 USPQ at 545.

[12] We find no merit in appellee's assertions of misrepresentations by Stevenson in regard to (a) claiming adjustable wheels and (b) disclosing the means of attaching wheel assemblies to the skateboard. In dependent claim 11, Stevenson claims adjustable wheels in combination with his kicktail platform structure. It is inconceivable that this limitation in a dependent claim, standing alone, in any way represents that he has invented adjustable wheels. He is claiming his kicktail platform structure in combination with adjustable wheels. He has in no way relied on this combination for the patentability of the independent claim. Similarly, his disclosure that the wheel assemblies are secured to the platform "by wood screws or the like" in no way teaches away from the use of rivets and bolts or any other known fastening devices. Such assertions by appellees are unfounded and unsupported by any evidence. Bare assertions can not provide the clear and convincing evidence required to establish fraud or inequitable conduct. Id. at 1408, 433 F. 2d at 797, 167 USPQ at 547.

#### *Conclusion*

Accordingly, we conclude, from the evidence of record, that appellees have failed to carry their burden of persuasion in asserting the invalidity of the subject claims of the Stevenson patent.

We reverse the Commission's determination that there is no violation of section 337 because, from the evidence of record, we conclude that the subject matter as a whole of claims 1, 2, 7, and 8 of the Stevenson patent would not have been obvious to one of ordinary skill in the art of designing skateboards at the time the invention was made. We remand to the Commission for action consistent with this opinion.

# Decisions of the United States Customs Court

United States Customs Court

One Federal Plaza  
New York, N.Y. 10007

*Chief Judge*

Edward D. Re

*Judges*

Paul P. Rao  
Morgan Ford  
Scovel Richardson  
Frederick Landis

James L. Watson  
Herbert N. Maletz  
Bernard Newman  
Nils A. Boe

*Senior Judge*

Samuel M. Rosenstein

*Clerk*

Joseph E. Lombardi

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## *Customs Decisions*

(C.D. 4829)

JAMES A. ELKINS, Jr., PLAINTIFF *v.* UNITED STATES, DEFENDANT

*Coral and Jade Carvings*

Court No. 75-12-03129

### EXPERT TESTIMONY—ANTIQUES

The testimony of plaintiff's expert witness persuaded the court that the imported coral and jade carvings were made prior to 100 years before their date of entry and were therefore entitled to entry free of duty as antiques under item 766.25 of the TSUS.

[Judgment for plaintiff.]

(Decided December 13, 1979)

*William Pannill* for the plaintiff.

*Alice Daniel*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in

Charge, Field Office for Customs Litigation, (*Susan C. Cassell* at the trial and on the brief), for the defendant.

WATSON, Judge: This action disputes the classification of three imported carvings, one from coral and two from jade. The coral carving, 5½ inches high, depicts a group of two ladies and a boy. One jade piece is a vase, 6¼ inches high, with carved flower decoration on the cover and body. The other jade piece, 8½ inches high, consists of four birds in an arboreal setting. The jade pieces originated from the People's Republic of China. All the items were imported from Singapore in 1974 and were classified under item 520.61<sup>1</sup> of the Tariff Schedules of the United States (TSUS) as other articles not specially provided for, of semiprecious stones. The coral piece was assessed with duty at the rate of 21 per centum ad valorem while the jade pieces bore the rate of 50 per centum ad valorem provided in column 2 of item 520.61.<sup>2</sup>

Plaintiff claims that these articles are entitled to entry free of duty as antiques made prior to 100 years before their date of entry under item 766.25<sup>3</sup> or alternatively as original sculptures under item 765.15<sup>4</sup> or original works of the free fine arts under item 765.25.<sup>5</sup>

Plaintiff's principal claim required it to prove that these articles were made prior to 100 years before their date of entry. This issue was tried by a straightforward confrontation of expert testimony which made the matter a classic example of the case decided on the trial judge's evaluation of the testimony given before him. In this regard the court was most favorably impressed with the authoritative testi-

<sup>1</sup> Schedule 5, part 1, subpart H:

Precious and semiprecious stones, cut but not set, and suitable for use in the manufacture of jewelry:

Other precious and semiprecious stones, and articles not specially provided for, of such stones:

520.61

Other.....

21% ad val.  
[and] 50%  
ad val.

<sup>2</sup> The col. 2 rates are applied in accordance with general headnote 3(e) of the TSUS, covering the products of certain Communist countries.

<sup>3</sup> Schedule 7, part 11, subpart B:

Ethnographic objects made in traditional aboriginal styles and made at least 50 years prior to their date of entry; and other antiques made prior to 100 years before their date of entry; all the foregoing articles, including such articles which have been repaired or renovated without changing their original form or character:

766.25

Other.....

Free

<sup>4</sup> Schedule 7, part 11, subpart A:

765.15

Original sculptures and statuary (including the first 10 castings, replicas, or reproductions made from a sculptor's original work or model with or without a change in scale and whether or not the sculptor is alive at the time the castings, replicas, or reproductions are completed), all the foregoing made in any form from any material as the professional productions of sculptors only, whether in round or in relief, and whether cut, carved, or otherwise wrought by hand or cast.....

Free

<sup>5</sup> Schedule 7, part 11, subpart A:

765.25

Original works of the free fine arts not provided for in the foregoing provisions of this part, in any media including, but not limited to, applied paper and other materials, manufactured or otherwise, such as are used on collages....

Free

mony of plaintiff's witness, Mr. Fong Chow, associate curator of Far Eastern art at the Metropolitan Museum of Art in New York. Both his credentials and substantive analysis of the articles were superior to those of defendant's witness who was Mr. Lowell Collins, an art teacher, art gallery owner and art appraiser. Although Mr. Collins' opinions were not lightly regarded, his grounding in oriental art was less than satisfactory to the court and his overall analysis was not persuasive. Mr. Chow's opinions were based on his analysis of the style and workmanship of the pieces and were arrived at following comparison of them with pieces in books, auction catalogs, and in the extensive collection of the Metropolitan Museum of Art. He dated the coral carving as "mid-19th century," the jade bird carving as late 18th to early 19th century and the jade vase as early 19th century.

Mr. Collins claimed to have found modern tool marks on the right hand of one of the coral ladies, marks which Mr. Chow did not see and which the court could not discern. The court was persuaded that certain modern tool marks on the jade bird carving were attributable to restorers employed to grind down the sharp broken tail of one of the birds.

Despite these marks, Mr. Chow's characterization and analysis of the entire piece was distinctly more persuasive. Mr. Collins claimed to have found modern tool marks on the lid of the jade vase. Mr. Chow explained those marks as part of a triangular stylized thunder pattern and the court believed his explanation.

For the above reasons, plaintiff proved by a preponderance of the evidence that these articles were made prior to 100 years before their date of entry. It is therefore unnecessary to reach its alternate claims, and judgment will enter accordingly.

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(C.D. 4830)

CERTIFIED BLOOD DONOR SERVICES, INC., PLAINTIFF  
v. UNITED STATES, DEFENDANT

*Diagnostic Serum*

Court No. 69/29877

STARE DECISIS

Imported serum used for diagnosis of blood disorders is properly classifiable as an "analogous biological product" under item 437.76 of the TSUS in accordance with the holding as to the same merchandise in *Certified Blood Donor Services, Inc. v. United States*, 62 CCPA66, C.A.D. 1147, 511 F. 2d 572 (1975). Additional proof offered by de-

fendant regarding whether or not the importations are subject to the licensing requirements of the Public Health Service does not bear on the meaning of the statutory term as interpreted by the CCPA and the normal rule of *stare decisis* should apply.

[Cross-motions for summary judgment; plaintiff's motion granted.]

(Decided December 14, 1979)

*Sharretts, Paley, Carter & Blauvelt, P.C.* (Peter Jay Baskin on the briefs) for the plaintiff.

*Alice Daniel*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Madeline B. Cohen* on the brief), for the defendant.

#### OPINION AND ORDER

WATSON, Judge: These are cross-motions for summary judgment in a dispute regarding the classification of imported serum used for the diagnosis of human blood disorders. The imported merchandise is the same in all material respects as the merchandise involved in *Certified Blood Donor Services, Inc. v. United States*, 62 CCPA 66, C.A.D. 1147, 511 F. 2d 572 (1975). It was classified under the ultimate residual provision of item 799.00<sup>1</sup> of the Tariff Schedules of the United States (TSUS).

In the previous action the principal question was the correctness of plaintiff's claim that item 437.76<sup>2</sup> of the TSUS, providing *inter alia* for "analogous biological products," described serums used for *diagnostic* purposes. The Court of Customs and Patent Appeals decided that it did. The issue was decided by reference to the "Tariff Classification Study Explanatory and Background Materials," November 15, 1960, schedule 4, part 3, page 86. The CCPA stated as follows:

\* \* \* That passage clearly demonstrates that the scope of item 437.76 was intended to "substantially correspond with the scope of the licensing requirements of the Public Health Service \* \* \* applicable to the importation of certain biological products." [62 CCPA at 70.]

The CCPA went on to state as follows:

These Public Health Service regulations broadly define the phase "applicable to the prevention, treatment or cure of diseases or injuries of man" as "including also any other use for purposes of diagnosis if the diagnostic substance so used is prepared from or with the aid of a biologic product." \* \* \* [*Id.* at 71.]

<sup>1</sup> Schedule 7, part 14—Nonenumerated products:

Any article, not provided for elsewhere in these schedules:

799.00	Other	9% ad val.
<sup>2</sup> Schedule 4	part 3—Drugs and related products; subpart B:	
437.76	Viruses, therapeutic serums, vaccines, toxins, antitoxins, and analogous biological products * * *	Free.



The term "biological product" was defined in 42 CFR 73.1 (1960) to include serums used for purposes of diagnosis. This led the CCPA to conclude that the proper classification of the imported merchandise was in item 437.76 of the TSUS as analogous biological products.

Plaintiff's motion for summary judgment is clearly meritorious and it remains only to comment on defendant's cross-motion and on its argument against the normal application of the rule of *stare decisis*.

In its opposition and cross-motion, the Government has concentrated its attention on proving that these importations did not have, and were not required to have, licenses under the Public Health Services Act. The Government argues that no *stare decisis* effect should be given to the CCPA decision because it erred as follows:

There was no finding by the court that either the merchandise itself was licensed or that the manufacturer's establishment was licensed. Therefore, the court could not find that the merchandise or manufacturing establishment substantially corresponded with the scope of the licensing requirements of the Public Health Service as mandated by the legislative history.

It is the opinion of this court that *stare decisis* should be given full force and effect and the licensing considerations raised by the defendant are irrelevant to the classification of the merchandise. The classification of these importations is to be arrived at by the interpretation of the language of the TSUS and not by considerations of whether the importations do or do not require licenses pursuant to other legislation or regulations. The purpose of resorting to the Public Health Service regulation was as an aid in defining the statutory term "analogous biological products" and the clear meaning of the CCPA opinion is that it was arriving at a definition of the term "analogous biological product." That definition includes products used for diagnosis because the legislative history shows that the term was intended to be understood in conformity with the meaning of the term "biological products" in the licensing requirements of the Public Health Service. The TSUS language was not intended to be limited in its application to articles which require licenses.

Admittedly, the trial court and the CCPA did give some attention to a stipulation between the parties regarding the license status of the importations but the significance of that attention is not apparent. It suffices to say that the opinion of the CCPA does not indicate that the existence or nonexistence of a license for a particular importation enters into the determination of whether it is an "analogous biological product" within the meaning of item 437.76 of the TSUS.

In the opinion of this court once the TSUS term has been defined through whatever means and with whatever aids, the effect of the interpretive aids such as the licensing provisions of the Public Health

Service regulations does not extend to further modify the application of the statutory term under the TSUS.

For the above reasons it is

ORDERED, ADJUDGED, AND DECREED, that plaintiff's motion for summary judgment be, and the same hereby is, granted; and it is further

ORDERED, ADJUDGED AND DECREED, that the diagnostic serum covered by the above-captioned action is properly classifiable as an analogous biological product under item 437.76, TSUS, free of duty; and it is further

ORDERED, ADJUDGED AND DECREED, that the Regional Commissioner of Customs at the Port of New York shall reliquidate the entry accordingly; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant's cross-motion for summary judgment be, and the same hereby is, denied.

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(C.D. 4831)

THE KINNEY CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

*Metal flats*

Court No. 77-4-00573

UNFINISHED PARTS

Unfinished metal flats were properly classified as parts of jewelry. The fact that they were subjected to processing after importation did not mean that they were not already parts as imported. Since the processing brought already advanced importations to the same final state of readiness without distinguishing between them, proof that final articles were chiefly used as parts of jewelry was equivalent to proof that the importations were so used. General interpretative rule 10(h) employed.

[Cross-motions for summary judgment; defendant's motion granted.]

(Decided December 14, 1979)

*Doherty and Melahn* (Robert Emmett Mullin, Jr., on the briefs) for the plaintiff.  
*Alice Daniel*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* on the briefs), for the defendant.

OPINION AND ORDER

WATSON, Judge: This dispute is before the court on cross-motions for summary judgment. The merchandise in question consists of two types of flat metal pieces with enamel decoration, referred to as

"flats." One is called the "Key-Shaped Mittersill" and the other is called the "Liberty Bell." The Mittersill flat is roughly in the shape of a key blank 1½ inches in length and one-half inch in width. It has on its face the name of the purchaser in script, a resort known as Mittersill, and the emblem of the resort, both on a white enamel background. The Liberty Bell flat is in the familiar shape of the Liberty Bell and is decorated in the colors of red, white, and blue. It measures three-quarters of an inch in length and slightly less than three-quarters of an inch in width.

The merchandise was imported from Taiwan and entered by mail at the port of Providence, R.I. It was classified under item 740.38<sup>1</sup> of the Tariff Schedules of the United States (TSUS) as parts of jewelry and assessed with duty at the rate of 27.5 per centum ad valorem. It is claimed that the merchandise is properly classifiable under item 657.30<sup>2</sup> of the TSUS as articles of copper, not coated or plated with precious metal, and dutiable at the rate of 0.6 cent per pound plus 11 per centum ad valorem.

The essential facts of the case are not in dispute although they have been the subject of some caviling between the parties. After removing the cavils and deleting those matters which are more in the nature of legal conclusions, the material facts in the case, based on the court's understanding of the record herein, are as follows:

1. The merchandise at issue in its condition as imported consists of metal flats with enamel decoration.
2. The merchandise is not used in its imported condition.
3. After importation and prior to sale the merchandise is subjected to additional processing.
4. After processing the merchandise is used for jewelry and non-jewelry uses.

Plaintiff relies on its presentation of representative samples of the importations and the affidavit of plaintiff's president to establish that the merchandise in question is not a part and is in chief value of copper. Plaintiff argues that in its condition as imported the merchandise is insufficiently advanced to be a part of jewelry and has equal potential to be used in both jewelry and nonjewelry items.

<sup>1</sup> Schedule 7, part 6, subpart A:

Jewelry and other objects of personal adornment not provided for in the foregoing provisions of this part (except articles excluded by headnote 3 of this part), and parts thereof:

Valued over 20 cents per dozen pieces or parts:

740.38 Other ..... 27.5% ad val.

<sup>2</sup> Plaintiff also made claims under items 654.05 and 657.35 but only the 657.30 claim was argued.

Schedule 6, part 3, subpart G:

Articles of copper, not coated or plated with precious metal:

657.30 Of copper, other than alloys of copper; of nickel silver or of cupro-nickel... 0.6¢ per lb. + 11% ad val.

Defendant relies on the presumptive correctness of its classification and on plaintiff's response to interrogatory No. 12(b) that "after manufacture, the chief use of the Mittersill flat and similar merchandise is as jewelry."

Plaintiff's argument that the importations are not sufficiently advanced to be parts is ingenious. They are clearly much too developed in form and in detail and too close to the final product to be considered mere material. While it is true that in their condition as imported they have the potential to be ultimately used for a variety of jewelry and nonjewelry uses, this "potential" is not reduced by their further advancement. When they are finally finished they have the same potential for alternative uses, and it is only the final act of attachment to specific items which "seals" their use. In other words, it might be an argument against determining the chief use in their unfinished state if further processing would create distinctions between those which would become parts of one type and those which would become parts of another type. See, for example, the treatment of amberoid shapes in *United States v. National Importing Co. (Inc.) et al.*, 12 Ct. Cust. Appls. 186, T.D. 40169 (1924). Here the further processing does not develop any distinction between the unfinished objects but simply brings them all into the same undifferentiated state of readiness for use. Therefore, the processing or advancement, being the same for all the objects, can be eliminated from the "equation" and it can be reasoned that the chief use of the unfinished object is the same as that of the finished object.

The implications of plaintiff's argument that these objects have no use at all in their imported condition would disrupt a basic statutory arrangement. If that reasoning were followed, no unfinished article could be classified in the provision for the finished article since it could always be argued that articles have no use in their unfinished state. Yet it is clear from general interpretative rule 10(h)<sup>3</sup> that the tariff schedules contemplate that articles whose finished form can be definitely discerned are described by the provision for the finished article even if they are unfinished.

Plaintiff makes a related argument that what was done here violated the principle that articles are to be classified in accordance with their condition as imported in that the chief use attributed to them does not become manifest until they are in finished form. However, this is based either on the assertion that the importations have no use in

<sup>3</sup> TSUS general headnotes and rules of interpretation:

10. *General interpretative rules.*—For the purposes of these schedules—

(h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished;

their imported condition, which is a groundless fiction, or on the assumption that they have a multiplicity of potential uses which are not determinable except as processing directs them one way or the other. As discussed earlier, plaintiff has not proved that the processing does anything to differentiate between these importations and therefore it is reasonable and correct to consider that their uses do not vary according to their condition. Consequently, they were classified in accordance with their condition as imported at which time the chief use could logically be ascertained.

For the same reason, although technically the answer to defendant's interrogatory 12(b) spoke of chief use after "manufacture," because the processing of the importations finished them in a uniform manner without developing use differentiations between them, it is logical to reason from the answer that absent intervening changes the chief use of the importations after "manufacture" must be the chief use at the time of importation. Accordingly, the answer is either an admission or proof by logical extension of the fact that the importations are chiefly used in jewelry. The defendant's cross-motion for summary judgment must therefore be granted, and it is hereby

ORDERED, ADJUDGED AND DECREED, that plaintiff's motion for summary judgment be, and the same hereby is, denied in all respects; and it is further

ORDERED, ADJUDGED AND DECREED, that defendant's cross-motion for summary judgment be, and the same hereby is, granted in all respects; and it is further

ORDERED, ADJUDGED AND DECREED, that judgment be, and hereby is, entered affirming the Customs classification of the imported merchandise under item 740.38, TSUS, and the assessment of duty thereunder at the rate of 27.5 per centum ad valorem. The action is accordingly dismissed.

# Decisions of the United States Customs Court

## *Customs Rules Decision*

(C.R.D. 79-17)

BENITO FERNANDEZ PANTOJA, AS FORMER DIRECTOR AND PRESIDENT  
OF MONTEZUMA OF FLORIDA, INC., A DISSOLVED FLORIDA CORPORATION,  
PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 79-5-00747

[Motion to dismiss denied.]

(Dated December 11, 1979)

*Morales, Rudolph & Hevia (Jorge Hevia, Jr. on the brief) for the plaintiff.  
Alice Daniel, Assistant Attorney General; Joseph I. Liebman, Attorney in  
Charge, Field Office for Customs Litigation (Jerry P. Wiskin on the brief), for  
the defendant.*

### *Opinion and Order*

FORD, Judge: Defendant, pursuant to rules 4.7 and 4.12 of the rules of this court has filed a motion to dismiss the above-entitled action on the ground that the court lacks jurisdiction.

Plaintiff opposes defendant's motion on the ground that it filed a protest on February 8, 1977. The alleged protest filed on said date is a "Discrepancy Report and Declaration" required by 19 CFR 18.6(c). Defendant denies the discrepancy report and declaration constitutes a protest within the meaning of section 514 of the Tariff Act of 1930 and Customs Regulations, 19 CFR 174.13. In any event, defendant brought to the attention of the court that the entry was liquidated on November 11, 1977, and consequently the alleged protest filed on February 8, 1977, is premature.

The court in reviewing the papers in this matter observed a photocopy of a letter dated October 30, 1978, from the district director of Customs at Miami, Fla., to counsel for plaintiff which reads as follows:

DEPARTMENT OF THE TREASURY,  
U.S. CUSTOMS SERVICE,  
*Miami, Fla., October 30, 1978.*

JORGE HEVIA, Jr., Attorney,  
Miami, Fla.

DEAR MR. HEVIA: Reference is made to your letter of January 20, 1978, requesting a refund of duties and internal revenue tax for 673 cartons of sparkling wine, that were found to be short in container No. 399368.

This office has reviewed the file of this importation and the circumstances revolving around the shortage of the wine. The ocean bill of lading indicates that there were 1,100 cartons in the container with corresponding weights. The container was delivered to Moctezuma of Florida, Inc., on January 21, 1977. On January 24, 1977, the seal was broken by Customs and at that time the shortage was discovered.

In the absence of evidence that the merchandise was not shipped by the shipper or not landed, Customs must assume that the total amount of 1,100 cartons were landed in the United States. In accordance with section 141.1 of 19 CFR, chapter 1, the importer of record is liable for all duty and taxes of imported merchandise. An allowance for deficiencies in contents of packages may be allowed under section 158.5 of 19 CFR, chapter 1, if the district director is satisfied of the validity of the importers claim of shortage. In the instant case, no proof has been submitted that 673 cartons of sparkling wine were not shipped or landed in the United States, and as stated previously, section 141.1 of 19 CFR, chapter 1, would apply.

In view of the above, this office has no alternative but to deny your claim for refund of duties.

Sincerely yours,

DOUGLAS D. ANGLE,  
*District Director.*

The reference to letter of counsel for plaintiff of January 20, 1978; prompted the court on November 8, 1979, to order the district director to forward to the court the letter or a photocopy of the letter of January 20, 1978, showing date of receipt. On December 2, 1979, a copy of a copy of the letter was received together with a letter of transmittal indicating the original letter could not be located and that the records of the district director do not indicate date of receipt. A copy of the letter received reads as follows:

A. KOSS, ATTORNEY AT LAW, P.A.,  
*Coral Gables, Fla., January 20, 1978.*

Re CE726026 dated January 14, 1977, imported by Moctezuma of Florida, Inc.

RICHARD T. MESSICK,  
*Senior Import Specialist, Department of the Treasury, U.S. Customs Service, Miami, Fla.*

DEAR MR. MESSICK: As you might be aware, this office repre-

sents Benito Fernandez Pantoja and his firm, Moctezuma de Florida, Inc.

We are somewhat surprised with your letter of November 29, 1977, copy attached. It is true that the importer is responsible for the duties and taxes. However, it cannot be assumed in this case that the 1,100 cases of sparkling wine (see photo attached) arrived since inspector E. K. Rawls noted, as you will appreciate that there were "427 cases only in container 399368."

Inspector Rawls made the statement after he personally opened the sealed containers.

Therefore, we respectfully request again a refund in the amount of \$7,074.36 for the 673 cartons missing. We are sure there is some misunderstanding here since the fisc is only interested in collecting its share of the duties.

We shall add again, as Customs has been advised, that the carrier has been unwilling to cooperate.

Very truly yours,

The question thus presented to the court is whether the letter constitutes a protest and whether it was timely filed.

Jurisdiction of this court is set forth in 28 U.S.C. 1582(a) which provides so far as is pertinent herein that this court "shall have exclusive jurisdiction of civil action instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate Customs officer. \* \* \*"

Section 514(a)(3) provides that decisions of the appropriate Customs officer including the legality of all orders and finding with respect to "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury" are final and conclusive unless a protest is filed or a civil action is instituted pursuant to 28 U.S.C. 2632 within 180 days, 28 U.S.C. 2631, of the denial of a protest. Section 514(2), Tariff Act of 1930, requires the filing of a protest within 90 days from the date of liquidation.

The entry was liquidated on November 11, 1977, and the letter of counsel for plaintiff is dated January 20, 1978.

The court is aware of the fact that the letter of counsel for plaintiff was addressed to a senior import specialist rather than the district director. However, the court notes the reply was from the district director in which the facts of the importation and the claim were acknowledged.

It has long been a cardinal rule in construing a protest that it need not be made with technical precision as long as the importer indicates distinctly and definitely the source of the complaint and his intention to make it the basis of his claim against the government. *Greeley's Administrator v. Burgess* (*Converse v. Burgess*), 59 U.S. 413.

In *Arthur v. Morgan*, 112 U.S. 495, the Supreme Court made the following observation:



\* \* \* A protest which indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles should not be discarded because of the brevity with which the objection is stated. [*Schell's Executors v. Fauché*, 138 U.S. 562.]

In addition to the foregoing, in instances such as in the case at bar, where the claim is obvious, a failure to state specific provisions of law is not fatal to the sufficiency of a protest. *How-Tex Peanut Company, Inc. v. United States*, 54 Cust. Ct. 316, Abs. 69066 (1965). In the case of *United States v. Eaton Mfg. Co.*, 60 CCPA 23 (1972), the court stated: "The denial of jurisdiction for insufficiency of protest is a severe action which should be taken sparingly." The construction above is indicative of the fact that the protest is sufficient notice to the district director of the intended claim.

It is also apparent that the claim for refund of duty and internal revenue tax is within the jurisdiction of the Secretary of Treasury.

The question as to whether the letter was timely received, since the office of the district director is unable to locate the original letter and cannot by records attest to the date of receipt is next considered. The letter dated January 20, 1978, was answered on October 30, 1978, and was accordingly received. The office of counsel for plaintiff is in Coral Gables, Fla., and the district director is in Miami, Fla., a distance of under 10 miles, according to the Rand McNally map contained in the "Standard Highway Guide." With all due respect to the efficiency of the Postal Service, occasions do arise when properly addressed mail is delayed or diverted from its appointed course. However, there is a strong presumption that letters entrusted to the mails reach their destination in the ordinary course of time. *Dunlop v. United States*, 165 U.S. 486. Even considering the delays in the mails, it can be presumed that delivery was accomplished within 19 days or prior to February 8, 1978, which is 90 days from the date of liquidation.

A further examination of the papers also indicates that a summons instituting the action in this court was timely filed.

The court having jurisdiction in this matter therefore denies defendant's motion to dismiss for lack of jurisdiction. This action should be noticed for trial for determination on the merits.

# Decisions of the United States Customs Court *Abstracts* *Abstracted Protest Decisions*

DEPARTMENT OF THE TREASURY, December 17, 1979.

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,  
*Commissioner of Customs.*

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED		HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate			
P79/223	Boe, J. December 12, 1979	Hugo Stinnes Steel & Metals Co.	74-4-01101	Item 948.00 10% supple- mental duty	Exempt from supplemental duty		Hugo Stinnes Steel and Metals Co. v. U.S. (C.D. 4753, aff'd C.A.D. 1226)	Detroit Articles of steel
P79/224	Boe, J. December 12, 1979	Hugo Stinnes Steel & Metals Co.	74-4-01103	Item 948.00 10% supple- mental duty	Exempt from supplemental duty		Hugo Stinnes Steel and Metals Co. v. U.S. (C.D. 4753, aff'd C.A.D. 1226)	Chicago Articles of steel

# Decisions of the United States Customs Court

## *Abstracts Abstracted Reappraisement Decision*

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/258	Re, C. J. December 12, 1979	Rosewood Fabrics, Inc.	78-7-01202	Export value	Invoice unit values	Agreed facts	New York Polyester knit fabrics
R79/259	Re, C. J. December 12, 1979	YKK Zipper YKK Zipper (USA), Inc.	74-10-02741	Constructed value	Equal to Invoiced unit prices plus 8.5% net, packed	Agreed facts	San Francisco-Oak- land (San Francisco) Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/260	Re, C. J. December 12, 1979	YKK Zipper Co. et al.	73-9-02001, etc.	Constructed value	Equal to Invoiced unit prices plus 8.5% net, packed	Agreed facts	Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/261	Re, C. J. December 12, 1979	YKK Zipper, Inc.	72-8-01841	Constructed value	Equal to Invoiced unit prices plus 8.5% net, packed	Agreed facts	Chicago Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/202	Re, C. J. December 12, 1979	YKK Zipper (Ill), Inc.	78-8-01877	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed facts	Chicago Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/263	Re, C. J. December 12, 1979	YKK Zipper (Mo), Inc. YKK Zipper Co.	75-1-00194, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed facts	Chicago Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74

# Judgment of the U.S. Customs Court in Appealed Case

DECEMBER 14, 1979

APPEAL 79-3.—Hambro Automotive Corporation *v.* United States—  
ERRORS IN APPRAISED VALUE OF AUTOMOBILES—MOTION TO  
DISMISS—LACK OF JURISDICTION.—C.D. 4761 affirmed August 23,  
1979 (C.A.D. 1231).

# International Trade Commission Notices

*Investigations by the U.S. International Trade Commission*

## DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

R. E. CHASEN,  
*Commissioner of Customs.*

In the Matter of  
CERTAIN FOOD SLICERS AND COM-  
PONENTS THEREOF

Investigation No. 337-TA-76

### *Notice of Investigation*

Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on November 5, 1979, amended on November 26, 1979, and further amended November 30, 1979, under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), on behalf of Prodyne Enterprises, Inc., P.O. Box 212, Montclair, Calif. 91763, alleging that unfair methods of competition and unfair acts exist in the importation into the United States of certain food slicers, or in their sale, because such food slicers are allegedly covered by claim 7 of U.S. Letters Patent 3,766,817. As amended, the complaint alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

Complainant requests that the Commission order temporary exclusion from entry into the United States of the imports in question during the pendency of the investigation, and permanent exclusion after a full investigation has been conducted.

Having considered the complaint, the Commission on December 4, 1979, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), an investigation be instituted to determine whether there is reason to believe there is a violation and whether there is a violation of subsection (a) of this section in the unlawful importation of certain food slicers and components thereof into the United States, or in their sale, because of the alleged infringement by such food slicers of claim 7 of U.S. Letters Patent No. 3,766,817, the effect or tendency of which is to destroy or injure substantially an industry, efficiently and economically operated, in the United States.

(2) For the purpose of this investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—  
Prodyne Enterprises, Inc.  
P.O. Box 212  
Montclair, Calif. 91763

(b) The respondents are the following companies alleged to be engaged in the unauthorized importation of certain food slicers and components thereof into the United States, or in their sale, and are parties upon whom the complaint is to be served:

E. Mishan & Sons  
1170 Broadway  
New York, N.Y. 10001

Crest Industries, Corp.  
593 Acorn Street  
Deer Park, N.Y. 11729

Albert E. Price, Inc.  
Interstate Industrial Park  
Bellmawr, N.J. 08031

Taiwan Timing Trading  
Co.  
Taichung, Taiwan

(c) JoAnn Miles, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, is hereby named Commission investigative attorney, a party to this investigation; and

(3) For the investigation so instituted, Chief Administrative Law Judge Donald K. Duvall, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, shall designate the presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's Rules of Practice and Procedure (19 CFR 210.21). Pursuant to section 201.16(d) and 210.21(a) of the rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and

this notice, and to authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination containing such findings.

The complaint is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, and in the Commission's New York office, 6 World Trade Center, New York, N.Y. 10048.

By order of the Commission.

Issued: December 13, 1979.

KENNETH R. MASON,  
*Secretary.*

In the Matter of  
CERTAIN AUTOMATIC CRANKPIN  
GRINDERS

Investigation No. 337-TA-60

*Commission Determination and Order*

INTRODUCTION

The U.S. International Trade Commission conducted investigation No. 337-TA-60 pursuant to section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), of alleged unfair methods of competition and unfair acts in the unauthorized importation and sale of certain automatic crankpin grinders. On December 4, 1979, the Commission unanimously determined that there was a violation of the statute in the importation or sale of certain automatic crankpin grinders which infringe claims 8, 16, and 19 of U.S. Letters Patent No. 3,118,258. The Commission determined, however, that the public interest factors enumerated in subsections (d) and (f) of the statute preclude the imposition of a remedy.

DETERMINATION

Having reviewed the record in this matter, the Commission has determined—

1. That there is a violation of section 337 of the Tariff Act of 1930, as amended, in the importation and sale of certain automatic crankpin grinders which infringe claims 8, 16, and 19 of U.S. Letters Patent No. 3,118,258, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

2. That the effect of a remedy upon the public health and welfare, competitive conditions in the U.S. economy, the production of like



or directly competitive articles in the United States, and U.S. consumers precludes the issuance of an exclusion order or a cease and desist order pursuant to subsection (d) or (f) of section 337 of the Tariff Act of 1930, as amended.<sup>1</sup>

## ORDER

Accordingly, it is hereby ordered that—

1. Investigation No. 337-TA-60 is terminated by the issuance and publication of the Commission determination and order in the Federal Register and by the issuance of this Commission determination, order, and opinions; and

2. This order shall be served upon each party of record in this investigation and upon the U.S. Department of Health, Education, and Welfare, the U.S. Department of Justice, and the Federal Trade Commission.

By order of the Commission.

Issued: December 17, 1979.

KENNETH R. MASON,  
*Secretary.*

In the Matter of  
CERTAIN LARGE VIDEO MATRIX  
DISPLAY SYSTEMS AND COM-  
PONENTS THEREOF

Investigation No. 337-TA-75

*Notice of Investigation*

Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on October 25, 1979, under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), on behalf of Stewart-Warner Corp., 1926 West Diversey Parkway, Chicago, Ill. 60614, alleging that unfair methods of competition and unfair acts exist in the importation of certain large video matrix display systems or components thereof into the United States, or in their sale, because such large video matrix display systems are: (a) Allegedly covered by the claims of U.S. Letters Patent Nos. 3,495,762, 3,941,926, 4,009,335,

<sup>1</sup> Chairman Parker determines that the appropriate relief in this case, in the light of the public interest and the remedial nature of sec. 337, is the issuance of an exclusion order preventing the importation of infringing articles during the life of the patent except (1) under license or (2) in the absence of the complainant granting a license when payment in the amount equal to but not to exceed the maximum license fee previously established by the patent owner Landis in arm's length agreement between the patent owner and any of its licensees is tendered by the importer to the patent owner. In the absence of the previous disclosure and establishment of such an amount, the amount that would be required to be tendered would be \$2,500 per imported article.

Commissioner Moore determines that the issuance of an exclusion order pursuant to subsection (d) of sec. 337 of the Tariff Act of 1930, as amended, preventing importation of infringing articles during the life of the patent except under license is the appropriate means to remedy the violation of sec. 337.

and 4,148,073; and (b) sold on such terms and conditions as to represent no reasonable expectation of a profit or to break even and which are predatory in nature.

The complaint alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

Complainant requests a temporary order of exclusion from entry into the United States of the imports in question. Complainant further requests that, after a full investigation, a permanent exclusion of said imports be ordered and a cease and desist order be issued.

Having considered the complaint, the Commission, on November 20, 1979, ORDERED THAT—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), an investigation be instituted to determine only whether there is, or there is reason to believe there is, a violation of subsection (a) of this section in the unlawful importation of certain large video matrix display systems or components thereof into the United States, or in their sale, because such large video matrix display systems are allegedly covered by the claims of U.S. Letters Patent Nos. 3,495,762, 3,941,926, 4,009,335, and 4,148,073, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States;

(2) For the purpose of this investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

Stewart-Warner Corp.  
1826 West Diversey Parkway  
Chicago, Ill. 60614

(b) The respondents are the following parties upon which the complaint is to be served:

SSIH Equipment S.A.  
a member of the Omega Electronics Group  
Rue Stampfli  
CH-2503 Bienne, Switzerland  
The Milwaukee Brewers Baseball Club, Inc.  
Milwaukee County Stadium  
201 South 46th Street  
Milwaukee, Wis. 53214;

(c) Donald R. Dinan, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, is hereby named Commission investigative attorney, a party to this investigation; and

(3) For the investigation so instituted, Chief Administrative Law

Judge Donald K. Duvall, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, shall designate the presiding officer.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's Rules of Practice and Procedure, as amended (19 CFR 210.21). Pursuant to sections 201.16(d) and 210.21(a) of the rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination containing such finding.

Pursuant to section 337(b)(3) of the Tariff Act of 1930, as amended by section 1105(a)(2) of the Trade Agreements Act of 1979, and section 201.4(d) of the Commission's Rules of Practice and Procedure, the Commission is notifying the Secretary of the Treasury that it has reason to believe that this matter is based in part on alleged acts and effects which are within the purview of section 303 of the Tariff Act of 1930 or of the Antidumping Act, 1921.

The complaint, except for the confidential information contained therein, is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, and in the Commission's New York City office, 6 World Trade Center, New York, N.Y. 10048.

By order of the Commission.

Issued: December 14, 1979.

KENNETH R. MASON,  
*Secretary.*

In the Matter of  
CERTAIN INCLINED-FIELD  
ACCELERATION TUBES AND  
COMPONENTS THEREOF

Investigation No. 337-TA-67

*Notice of Prehearing Conference and Hearing*

Notice is hereby given that a prehearing conference will be held in

this case at 9:30 a.m. on January 10, 1980, in room 610, Bicentennial Building, 600 E Street NW., Washington, D.C. The purpose of this prehearing conference is to review the prehearing statements submitted by the parties, to complete the exchange of exhibits, and to resolve any other necessary matters in preparation for the hearing.

Notice is also given that the hearing in this proceeding will commence at 9:30 a.m. on January 14, 1980, in room 610, Bicentennial Building, 600 E Street NW., Washington, D.C.

The Secretary shall publish this notice in the Federal Register.

Issued: December 17, 1979.

JANET D. SAXON,  
*Administrative Law Judge.*

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The U.S. International Trade Commission issued in December 1979 a volume containing the legal text of the Tariff Schedules of the United States, as amended and modified. This volume, entitled "Tariff Schedules of the United States Annotated (1980)," (TSUSA) contains major revisions pursuant to the Trade Agreements Act of 1979 (93 Stat. 147) and concessions granted in the Geneva (1979) Protocol to the General Agreement on Tariffs and Trade (GATT). These revisions relate to staged reductions in rates of duty as well as necessary language and numbering changes. It also includes a new rate-of-duty column entitled "LDDC" which rate reflects the full tariff reduction without staging, for certain products of the least developed developing countries (LDDC's) pursuant to section 503(a)(2)(A) of the Trade Agreements Act of 1979, and changes made in the reporting of statistical data under the provisions of section 484(e), Tariff Act of 1930.

This volume is being published under the authority of section 201 of the Tariff Classification Act of 1962 and contains all changes in the schedules made on or after the effective date of that act (August 31, 1963) and before December 11, 1979, together with annotations prescribing statistical information to be supplied on Customs forms.

This publication is for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Subscriptions thereto will be handled as follows:

The "TSUSA (1980)," including all supplements thereto, can be purchased at subscription price of \$28 for first-class mailing or \$23 for fourth-class mailing within the United States and possessions. For mailing to all other countries, the subscription prices are \$35 for

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